AmBank (M) Bhd (formerly known as AmFinance Bhd) v Tan Tem Son and another appeal

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NOS 03–1–03 OF 2012(J) AND 03–2–03 OF 2012(J)

RAUS SHARIF PCA, ZULKEFLI CJ (MALAYA), HASHIM YUSOFF, AHMAD MAAROP AND SULONG MATJERAIE FCJJ

18 JANUARY 2013

Bankruptcy — Practice and procedure — Bankruptcy proceedings — Whether leave to issue execution under O 46 r 2 of the Rules of the High Court 1980 required to file bankruptcy proceedings on final judgment more than six years old — Whether O 46 r 2 applied to bankruptcy proceedings — Whether only bar to filing bankruptcy proceedings was 12-year limitation governing action upon a judgment under s 6(3) of the Limitation Act 1953 — Whether bankruptcy proceeding was not writ of execution but action upon judgment

The question for determination in this appeal was whether a judgment creditor wanting to file bankruptcy proceedings on a final judgment that was more than six years old had to first obtain leave of court to issue execution pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980 ('RHC'). Although that question was decided in the negative by the Federal Court in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 ('*Lim Ah Hee*'s case'), the appellant in the two instant appeals contended that several other decisions of the High Court and one by the Court of Appeal had decided that question in the affirmative thus creating confusion. The common appellant in both appeals ('AmBank') had taken judgment against the respective respondents, Tan Tem Son ('Tan') and Pua Keng Siang ('Pua') who had both guaranteed a repayment of a loan. In Tan's case, Tan succeeded before the deputy registrar in setting aside AmBank's bankruptcy notice against him on the ground leave was not obtained to enforce the judgment as it was more than six years old. AmBank's appeal against that decision to the judge failed and it appealed to the Court of Appeal. In Pua's case, an identical application was allowed by the deputy registrar but the decision was reversed on appeal by the judge. Pua succeeded in his appeal to the Court of Appeal and the outcome of his case, by agreement of the parties, bound Tan's case resulting in AmBank's appeal being dismissed. In finding for Pua, the Court of Appeal unanimously held that on the date the bankruptcy notice was issued, AmBank had not obtained leave of court under O 46 r 2 of the RHC to issue a writ of execution. And because it could not issue a writ of execution for want of leave, AmBank was not 'a person who is for the time being entitled to enforce a final judgment' under s 3(1)(i) of the Bankruptcy Act 1967 ('BA') and therefore could not issue a bankruptcy

notice as it did not qualify to be a 'creditor' under that section. AmBank was granted leave to appeal to the Federal Court.

Held:

(1) Order 46 r 2 of the RHC did not apply to bankruptcy proceedings. A bankruptcy proceeding was not a writ of execution within the meaning of O 46 r 2 of the RHC (see para 62).

(2) A bankruptcy proceeding was an action to enforce a judgment ie an action upon a judgment within the meaning of s 6(3) of the Limitation Act 1953 ('Act'). Since the limitation period for bringing an action upon a judgment was 12 years, a judgment creditor was entitled to enforce a final judgment by instituting bankruptcy proceedings without the leave of the court within that period of 12 years. In other words, if the judgment creditor instituted bankruptcy proceedings to enforce a final judgment within that 12-year period, he 'shall be deemed to be a creditor who has obtained a final judgment or final order' within the meaning of s 3(1)(i) of the BA (see para 62).

(3) Since O 46 r 2 of the RHC did not apply to bankruptcy proceedings, there was no reason or justification to use it to read into the phrase 'execution thereon not having been stayed' in s 3(1)(i) of the BA 1967 the implication that in addition to there being no stay of execution by the court the creditor must be in a position to issue immediate execution. The only bar for the institution of bankruptcy proceedings was the limitation under s 6(3) of the Act (see para 62).

(4) Unlike an execution proceeding, a bankruptcy proceeding bore the characteristics of a fresh proceeding. Unlike execution, which was the continuation of the existing proceeding to enforce a judgment provided by the RHC, bankruptcy proceedings were provided for by separate law and rules, the focus being the judgment debtor, not the debt, and the object being to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the debtor's status into a bankrupt with certain disqualifications and disabilities, the most important being the loss of control over his properties to the official assignee (see para 62).

[Bahasa Malaysia summary

Persoalan untuk penentuan dalam rayuan ini adalah sama ada pemiutang penghakiman yang hendak memfailkan prosiding kebankrapan atas penghakiman muktamad yang lebih enam tahun mesti terdahulunya mendapatkan izin mahkamah untuk mengeluarkan pelaksanaan berikutan A 46 k 2(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Walaupun persoalan diputuskan negatif oleh Mahkamah Persekutuan dalam kes *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 ('kes Lim Ah

Hee'), perayu dalam kedua-dua rayuan ini berhujah bahawa beberapa keputusan lain Mahkamah Tinggi dan satu keputusan oleh Mahkamah Rayuan telah memutuskan persoalan tersebut secara afirmatif dengan itu membentuk kekeliruan. Perayu biasa di dalam kedua-dua rayuan ('AmBank') telah mengambil penghakiman terhadap responden-responden masing-masing, Tan Tem Son ('Tan') dan Pua Keng Siang ('Pua') yang mana kedua-duanya menjamin pembayaran balik pinjaman tersebut. Dalam kes Tan, Tan berjaya di hadapan timbalan pendaftar dalam mengetepikan notis kebankrapan AmBank terhadapnya atas alasan izin tidak diperolehi untuk menguatkuasakan penghakiman kerana ia lebih dari enam tahun. Rayuan AmBank terhadap keputusan tersebut kepada hakim gagal dan ia merayu kepada Mahkamah Rayuan. Dalam kes Pua, permohonan yang sama dibenarkan oleh timbalan pendaftar tetapi keputusan tersebut diakas atas rayuan oleh hakim. Pua berjaya dalam rayuannya kepada Mahkamah Rayuan dan keputusan kesnya, dengan persetujuan kedua-dua pihak, mengikat kes Tan mengakibatkan rayuan AmBank ditolak. Dalam memutuskan untuk Pua, Mahkamah Rayuan sebulat suara memutuskan bahawa pada tarikh notis kebankrapan dikeluarkan, AmBank tidak memperolehi izin mahkamah di bawah A 46 k 2 KMT untuk mengeluarkan writ pelaksanaan. Dan oleh kerana ia tidak dapat mengeluarkan writ pelaksanaan untuk mengkehendaki izin, AmBank bukan 'a person who is for the time being entitled to enforce a final judgment' di bawah s 3(1)(i) Akta Kebankrapan 1967 ('AK') dan oleh itu tidak dapat mengeluarkan notis kebankrapan kerana ia tidak layak menjadi 'creditor' di bawah seksyen tersebut. AmBank diberikan izin untuk merayu ke Mahkamah Persekutuan.

Diputuskan:

(1) Aturan 46 k 2 KMT, tidak terpakai kepada prosiding kebankrapan. Prosiding kebankrapan bukan writ pelaksanaan dalam maksud A 46 k 2 KMT (lihat perenggan 62).

(2) Prosiding kebankrapan adalah tindakan untuk menguatkuasakan penghakiman iaitu tindakan ke atas penghakiman dalam maksud s 6(3) Akta Had Masa 1953 ('Akta'). Memandangkan tempoh had masa untuk memasukkan tindakan ke atas penghakiman adalah 12 tahun, pemiutang penghakiman berhak untuk menguatkuasakan penghakiman muktamad dengan memulakan prosiding kebankrapan tanpa izin mahkamah dalam masa tempoh 12 tahun. Dalam perkataan lain, jika pemiutang penghakiman memulakan prosiding kebankrapan untuk menguatkuasakan penghakiman muktamad dalam tempoh 12 tahun tersebut dia 'shall be deemed to be a creditor who has obtained a final judgment or final order' dalam maksud s 3(1)(i) AK (lihat perenggan 62).

(3) Memandangkan A 46 k 2 KMT tidak terpakai kepada prosiding kebankrapan, tidak perlu alasan atau justifikasi untuk menggunakannya

untuk membaca ke dalam frasa 'execution thereon not having been stayed' dalam s 3(1)(i) AK implikasinya adalah bahawa sebagai tambahan kepada ketiadaan penangguhan pelaksanaan oleh mahkamah, pemiutang mesti dalam kedudukan untuk mengeluarkan pelaksanaan segera. Satu-satunya halangan untuk memulakan prosiding kebankrapan adalah had masa di bawah s 6(3) Akta (lihat perenggan 62).

(4) Tidak seperti prosiding pelaksanaan, prosiding kebankrapan melihatkan sifat prosiding baru. Tidak seperti pelaksanaan, yang mana adalah pelanjutan prosiding sedia ada untuk menguatkuasakan penghakiman yang diperuntukkan oleh KMT, prosiding kebankrapan diperuntukkan oleh undang-undang berasingan dan peraturan-peraturan, di mana fokus adalah penghutang penghakiman, bukan hutang, dan objek adalah untuk melantik penerima sebagai pegawai pemegang harta ke atas aset penghutang dan untuk menukar status penghutang kepada bankrap dengan ketidaklayakan dan ketakupayaan tertentu, yang penting sekali adalah kehilangan kawalan ke atas hartanahnya kepada pegawai pemegang harta (lihat perenggan 62).]

Cases referred to

Abigroup Limited v Sennaro Abignano (1992) 112 ALR 497, FC (refd)
Cawood v Cowood [2000] FCA 1786, FC (refd)
Chan Sin Lan v Delta Finance Bhd [2004] 3 MLJ 178, CA (refd)
Chan Boon Heng, Re; ex p Associated Tractors Sdn Bhd [2009] 2 CLJ 552, HC (refd)
Haji Ahmad bin Lazim & Ors, Re; ex parte Bank Kerjasama Rakyat (M) Bhd [1999] 5 MLJ 478, HC (refd)
Ide, Re; ex parte Ide (1886) 17 QBD 765, CA (refd)
Low Mun v Chung Khiaw Bank Ltd [1988] 1 MLJ 263, SC (refd)
Lee Che Peh aka Lee Chee Peh, Re; ex p Tractors Malaysia (1982) Sdn Bhd [2003] 5 MLJ 463, HC (refd)
Liew Kong Ken, Re; ex p Sucorp Enterprise Sdn Bhd [1998] MLJU 416; [1998] 2 CLJ Supp 508, HC (refd)
Low Tung Kwai, Re; ex p Perwira Affin Bank Bhd [2001] 6 MLJ 39, HC (refd)
Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee [2004] 3 MLJ 253; [2004] 2 CLJ 787, FC (refd)
Tan Ah Dek v AmBank (M) Bhd Civil Appeal No B-03–90–10 (unreported), CA (refd)
Tan Ah Tong v Dato' Seri Dr Kuljit Singh [2002] 6 MLJ 39, HC (refd)
Tan Chwee Hock v AmBank (M) Bhd (previously known as AmFinance Bhd) [2012] 4 MLJ 159, CA (refd)
Tan Peng Hock v AmBank (M) Berhad (terdahulu dikenali sebagai AmFinance Bhd) [2011] MLJU 333, CA (refd)
Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd [2002] 1 MLJ 312, HC (refd)

V Gopal, Re; ex p Bank Buruh (M) Bhd [1987] 1 CLJ 602, HC (refd)
Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508, HC (refd)
Woodall, Re; ex p Woodall (1884) 13 QBD 479, CA (refd)

Appeal from: Civil Appeal No J-03–96 of 2009 (Court of Appeal, Putrajaya)

Legislation referred to

Bankruptcy Act 1890 [UK] s 1
Bankruptcy Act 1883 [UK] s 4(1)(g)
Bankruptcy Rules 1883 [UK] r 263
Bankruptcy Act 1966[AU] s 40(1)(g), (3), (3)(d), (3)(e), 41(3)(b), (3)(c)
Bankruptcy Act 1967 ss 2, 3, 3(1), (1)(i), 5, 123
Bankruptcy Rules 1969 r 276
Limitation Act 1953 ss 2, 26(3)
Limitation Ordinance (Sarawak)(Cap 4a) ss 40(1)(g), (3)(d)(e), 41(3), (b), (c)
Rules of the Supreme Court 1883 [UK] O 42 rr 10, 22, 23, 23(a)
Rules of the High Court 1980 O 45 r 1, O 46 rr 1, 2, 2(1)(a), 2(10)(a)

Manpal Singh Sachdev (Tan Weng Hung with him) (Manjit Singh Sachdev) (Mohammad Radzi & Partners) for the appellant.
Christie Soosay Nathan (S Surendran, Mohd Fakhzan, TY Wu with him) (Wu & Co) for the respondent.

Ahmad Maarop FCJ (delivering judgment of the court):

BACKGROUND

[1] There are two appeals before this court — (a) Civil Appeal No 03–1–03 of 2012 and (b) Civil Appeal No 03–2–03 of 2012. In both appeals, AmBank (M) Bhd (formerly known as AmFinance Bhd) — the appellant appealed against the decisions of the Court of Appeal made on 2 November 2011 in Civil Appeal No J-03–335 of 2009 and Civil Appeal No J-03–96 of 2009 respectively.

[2] The brief facts of the case are these. In 1996 the appellant bank granted a loan in the sum RM1,500,000 to a company known as Hwa Yak Hong (M) Sdn Bhd ('HYH'). Tan Tem Son, the respondent in Civil Appeal No 03–1–03 of 2012 together with Pua Keng Siang the respondent in Civil Appeal No 03–2–02 of 2012 were guarantors for the loan. HYH defaulted in the repayment of the loan. Tan Tem Son and Pua Keng Siang also failed to settle the same. In May 1998, the appellant filed a civil suit against HYH, Tan Tem Son and Pua Keng Siang for the recovery of the amount owing, interest and costs. On 19 August 1998 the appellant obtained a judgment in default against Tan Tem Son and Pua Keng Siang. The total amount owing as stated in the

judgment was RM1,642,029.21 calculated as at 28 February 1998 with further interest and costs. There is nothing to show that the execution of that judgment was stayed. The said judgment was the basis of the bankruptcy proceedings against Tan Tem Son and Pua Keng Siang which resulted in the Court of Appeal Civil Appeals No J-03–335 of 2009 and No J-03–96 of 2009 respectively.

COURT OF APPEAL CIVIL APPEAL NO J-03–335 OF 2009

[3] On or about 17 October 2000, the appellant initiated a bankruptcy proceeding against Tan Tem Son at the Johor Bahru High Court, in bankruptcy No 29–4040 of 2000 ('the first bankruptcy proceeding').

[4] Thereafter, several part payments were made to repay a part of the judgment debt, as follows:

(a) RM95,000 on 17 October 2001;

(b) RM100,000 on 25 July 2003; and

(c) RM755,000 on 28 November 2003.

[5] On 20 August 2004, the first bankruptcy proceeding was set aside by a court order. In October 2005, the appellant applied for leave to enforce the said judgment, after more than six years from the date of judgment. The said application was dismissed by the deputy registrar on 17 July 2006. The appellant appealed to the judge in chambers. The said appeal was also dismissed by the High Court judge on 13 December 2006. Tan Tem Son still failed, refused and/or neglected to repay the balance owing to the appellant.

[6] On 12 March 2007, the appellant initiated another bankruptcy proceeding against Tan Tem Son at the Johor Bahru High Court, in Bankruptcy No 29–752 of 2007 ('the second bankruptcy proceeding'). On or about 12 June 2007, Tan Tem Son made an application to set aside the bankcruptcy notice in respect of the second bankruptcy proceeding, inter alia, on the ground that leave was not obtained to enforce the said judgment, after more than six years from the date of judgment. The application was allowed by the deputy registrar on 25 April 2008. The appellant appealed to the judge in chambers. The said appeal was dismissed by the High Court judge on 27 October 2009. The appellant appealed to the Court of Appeal on 23 November 2009.

COURT OF APPEAL CIVIL APPEAL NO J-03–96 OF 2009

[7] On or about 17 October 2000, the appellant initiated a bankruptcy

proceeding against Pua Keng Siang at the Johor Bahru High Court, in Bankruptcy No 29–4051 of 2000 ('the first bankruptcy proceeding').

[8] Thereafter, several part payments were made to repay a part of the judgment debt, as follows:

(a) RM95,000 on 17 October 2001;

(b) RM100,000 on 25 July 2003; and

(c) RM755,000 on 28 November 2003.

[9] On 20 August 2004, the first bankruptcy proceeding was set aside by a court order. In October 2005, the appellant applied for leave to enforce the said judgment, after more than six years from the date of judgment. The said application was dismissed by the deputy registrar on 17 July 2006. The appellant then appealed to the judge in chambers. The said appeal was also dismissed by the High Court judge on 13 December 2006. Pua Keng Siang still failed, refused and/or neglected to repay the balance owing to the appellant.

[10] On 12 March 2007, the appellant initiated another bankruptcy proceeding against Pua Keng Siang at the Johor Bahru High Court, in Bankruptcy No 29–752 of 2007 ('the second bankruptcy proceeding'). On or about 12 June 2007, Pua Keng Siang made an application to set aside the bankruptcy notice in respect of the second bankruptcy proceeding, inter alia, on the ground that leave was not obtained to enforce the said judgment, after more than six years from the date of judgment. That application was allowed by the deputy registrar on 25 April 2008. The appellant appealed to the judge in chambers. The appellant's appeal was allowed by the High Court judge on 24 February 2009. Pua Keng Siang appealed to the Court of Appeal on 6 March 2009.

[11] At the outset of the hearing in the Court of Appeal, parties in both appeals agreed that the decision in Civil Appeal No J-03–96 of 2009 would bind the parties in the Civil Appeal No J-03–335 of 2009 since the decisions in both appeals would turn on a similar primary issue.

[12] In J-03–96 of 2009, the Court of Appeal allowed Pua Keng Siang's appeal with cost and set aside the second bankruptcy notice. The Court of Appeal held that:

> In the above circumstances, we are unanimous in our view, that on the date of the issue of the impugned bankruptcy notice the JC is not, in fact and in law, a person falling within the meaning of the term 'a creditor' under s 3(1)(i) of the Bankruptcy Act 1967, as without having first obtained leave of the court under O 46 r 2 of the Rules of High Court 1980 read with s 6(3) of the Limitation Act 1953, he is not

entitled to enforce the judgment in default, dated 19 June 1998. A person, who cannot issue a writ of execution by the operation of O 46 r 2 of the Rules of High Court 1980, without first having obtained such leave, is in fact not a 'person who is for the time being entitled to enforce a final judgment'. Such a person cannot, therefore, issue a bankruptcy notice under s 3(1)(i) of the Bankruptcy Act 1967

[13] Since parties had agreed that the decision in J-03–96 of 2009, would bind parties in J-03–335 of 2009, the Court of Appeal dismissed with costs the appellant's appeal in J-03–335 of 2009.

[14] The appellant applied for leave from the Federal Court to appeal against the aforesaid decisions.

[15] On 6 March 2012, this court granted leave to the appellant to appeal in both cases on the following questions of law:

THE FIRST QUESTION

(c) Whether the phrase 'any person who is for the time being entitled to enforce a final judgment' in the proviso to s 3(1)(i) of the Bankruptcy Act 1967 requires the judgment creditor to obtain leave pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980 prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more than six years ago, particularly in view of the conflicting decisions by the courts in the cases of:

(i) *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253 (FC) and *Re Chan Boon Heng ex p Associated Tractors Sdn Bhd* [2009] 2 CLJ 552 (HC) — which answers the question above in the negative; and

(ii) *Chin Sin Lan v Delta Finance Bhd* [2004] 3 MLJ 178 (COA); *Re v Gopal ex p Bank Buruh (M) Berhad* [1987] 1 CLJ 602 (HC); *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 (HC); *Liew Kong Ken ex p Sucorp Enterprise Sdn Bhd* [1998] 2 CLJ Supp 508 (HC); *Re Haji Ahmad bin Lazim & Ors ex p Bank Kerjasama Rakyat (M) Sdn Bhd* [1999] 5 MLJ 478 (HC); *Re Low Tung Kwai ex p Perwira Affin Bank Bhd* [2001] 6 MLJ 39 (HC); *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312 (HC); *Tan Ah Tong v Dato' Seri Dr Kuljit Singh* [2002] 6 MLJ 39 (HC) and *Re Lee Che Peh @ Lee Chee Peh ex p Tractors Malaysia (1982) Sdn Bhd* [2003] 5 MLJ 463 (HC) — which answers the question above in the affirmative?

THE SECOND QUESTION

e(i) Whether as a matter of law part payments made would extend the limitation period of a judgment under s 6(3) of the Limitation Act 1953 pursuant to s 26(2) of the Limitation Act 1953, in particular with reference to s 5 of the Limitation Act 1953?

THE THIRD QUESTION

(ii) In the event question (e)(i) above is answered in the affirmative, whether the filing of a bankruptcy notice within six years from the extended limitation period would require leave of court under O 46 r 2(1)(a) of the Rules of the High Court 1980?

SUBMISSION

The first question

The appellants' submission

[16] Learned counsel for the appellant raised the question whether leave to execute was required? For this he submitted that the most important issue for the court to decide was whether or not a bankruptcy notice was a writ of execution thereby attracting the application of O 46 r 2(1)(a) of the Rules of the High Court 1980 ('RHC 1980')? Learned counsel cited the decision of this court in *Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee* [2004] 3 MLJ 253; [2004] 2 CLJ 787 which he submitted had provided a negative answer to the question he raised. Learned counsel relied on the judgment of Abdul Hamid Mohd FCJ (later CJ) who, in delivering the judgment of the court said on p 262 (MLJ); p 797 (CLJ):

> Furthermore, if we bear in mind that the words used in our O 46 r 2 of the RHC 1980 and in the English Rules are 'A writ of execution to enforce a judgment …' clearly a bankruptcy notice or a bankruptcy petition cannot be 'a writ of execution'. So, in my view, *our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O 46 r 2 of the RHC 1980.*

[17] Learned counsel submitted that His Lordship made clear at p 266 (MLJ); p 800 (CLJ) of his judgment that 'a bankruptcy notice or a bankruptcy petition' cannot be 'a writ of execution':

> We have seen from decided cases and I agree that a bankruptcy proceeding is not 'a writ of execution' within the meaning of O 46 r 2 of the RHC 1980.

[18] Learned counsel argued that His Lordship gave two rational and sound reasons for his decision as such. The first, according to learned counsel was at p 266 (MLJ); p 801 (CLJ) when His Lordship said:

> A question then may be asked: on the same reasoning, is an 'execution' not a 'proceeding in court'? Of course it is a proceeding in court but, *I think the distinction lies in the fact execution is the continuation of the existing proceeding to enforce the judgment provided by the same rules of court, the RHC 1980. On the other hand, bankruptcy proceedings are provided by separate law and rules, ….* Furthermore, a bankruptcy proceeding is by way of petition, just like divorce, winding-up or

election, to name a few. Thus a bankruptcy proceeding bears the characteristics of a fresh proceeding unlike an execution proceeding.

[19] According to learned counsel, the second reason was given when His Lordship said:

> Bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee. The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceeding.

[20] Learned counsel then submitted that the decision in *Lim Ah Hee* as aforesaid was followed by the High Court in *Re Chan Boon Heng ex p Associated Tractors Sdn Bhd* [2009] 2 CLJ 552 in which case the High Court said:

> [28] I am in full agreement with the reasoning by Abdul Hamid Mohamed FCJ that a bankruptcy proceeding is not 'a writ of execution' within the meaning of O 46 r 2 of the RHC 1980. Equally it does not necessarily mean that it is 'an action upon any judgment' in the light of the definition given in s 2 of the Limitation Act 1953 which includes a 'suit' or any other proceeding.
>
> [29] The court also viewed that an execution is a proceeding in court and concur with the learned judge that an execution is the continuation of the existing proceedings to enforce the judgment provided by the same rules of court namely RHC. However, in respect of bankruptcy proceedings are governed by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in person of the official assignee. A bankruptcy proceeding is by way of petition and it bears the characteristics of a fresh proceeding unlike an execution proceeding.

[21] According to learned counsel, that decision was upheld by the Court of Appeal in a unanimous decision on 16 August 2010 in Civil Appeal No K-03–216 of 2007. Learned counsel contended that that decision of the Court of Appeal affirmed the High Court's decision that leave under O 46 r 2(1)(a) of the RHC 1980 was not required to enforce by way of bankruptcy proceeding, a judgment debt which exceeded six years. In support of his submission learned counsel also cited the dissenting judgment in the Court of Appeal case of *Tan Chwee Hock v AmBank (M) Bhd(previously known as AmFinance Bhd)* [2012] 4 MLJ 159 where Anantham Kasinather JCA said:

> [44] … By the same token since bankruptcy proceedings are not execution

A [47] … In my opinion no matter how extended a meaning is attached to the words 'writ of execution'… it cannot encompass bankruptcy proceedings. This is because writs are issued by the court and the form of a writ of execution is to be found in Appendix A to the Rules of the High Court 1980 unlike a bankruptcy notice which is issued in a form prescribed in the Bankruptcy Rules. Indeed that bankruptcy and
B execution are poles apart is best demonstrated by the provision in the Bankruptcy Rules that the rules of the High Court have no application to bankruptcy proceedings (see r 276 of the Bankruptcy Rules) 1969.

C **[22]** Based on the authorities as aforesaid learned counsel submitted that it was logical that since bankruptcy proceedings were held not to be execution proceedings, then O 46 r 2(1)(a) of the RHC should not be applicable in construing the phrase 'any person who is for the time being entitled to enforce a final judgment … and execution thereon not having been stayed'.

D **[23]** Continuing his submission, learned counsel contended that bankruptcy proceedings were not subjected to the provision under O 46 r 2(1)(a) of the RHC. In this regard he argued that in cases decided by the High Courts and the Court of Appeal in which the courts held that leave under O 46
E r 2(1)(a) of the Rules 1980 was required for filing of a bankruptcy notice based upon a judgment which was more than six years, reliance was placed on the following two cases:

(a) *Re V Gopal; ex p Bank Buruh (M) Bhd* [1987] 1 CLJ 602; and

F (b) *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508.

[24] Unfortunately, according to learned counsel, in relying on *Re V Gopal* and *Wee Chow Yong*, the courts below had failed to appreciate that there were
G deficiencies in both the cases. In respect of *Re V Gopal*, learned counsel pointed out six deficiencies. First, according to learned counsel, the effective date for the purpose of interpreting s 3(1)(i) of the BA 1967, was not the date of service of the bankruptcy notice as held by the learned judge. The effective date was the date on which the bankruptcy notice was issued because the phrase used in
H s 3(1)(i) of the Bankruptcy Act 1967 (BA 1967) was, 'with interest quantified up to the date of issue of the bankruptcy notice'. Secondly, the bankruptcy notice was in fact issued a few days before the six years had lapsed. The judgment creditor was within the six years time frame from the date of the judgment. Therefore the learned judge erred in holding that it was beyond six
I years from the date of the judgment on the basis that the relevant date was the date of service of the bankruptcy, and not the date of issue of the same. Learned counsel submitted that based on the compound errors, the learned judge erred in deciding that leave to execute was required in bankruptcy proceeding by virtue of the proviso to s 3(1)(i) of the BA 1967. Consequently, he submitted

that the learned judge had erred in applying O 46 r 2(1)(a) of the RHC 1980 in dismissing the bankruptcy petition. Thirdly, learned counsel contended that the learned judge erred in deciding that 's 4(1)(g) of the relevant English Bankruptcy Act was in pari materia with our s 3(1)(i)', because s 4(1)(g) of the Bankruptcy Act 1883 in England then, did not have the proviso contained under our s 3(1)(i) of the BA 1967 which reads:

> Provided that for the purposes of this paragraph and of section 5, any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order.

[25] According to learned counsel a similar proviso was added to the English provision with the enactment of s 1 of the Bankruptcy Act 1890 which took effect from 18 August 1990. Fourthly, as an extension to his submission on the third deficiency, learned counsel argued that the English cases relied upon by the learned judge, namely, *Woodall ex parte Woodall* (1884) 13 QBD 479 and *Re Ide, ex parte Ide* (1886) 17 QBD 765 were decided a few years before the proviso (similar to the proviso to our s 3(1)(i) of the BA 1967) was added to the English Bankruptcy Act 1883. Fifthly, learned counsel submitted that the learned judge might not have been appraised of r 263 of the English Bankruptcy Rules 1883 which provided that 'And save as provided by these Rules, or rules amending them, the Rule of the Supreme Court shall not apply to any proceeding in bankruptcy'. As such learned counsel contended that it was wrong to apply O 42 rr 22 and 23(a) of the English Rules of the Supreme Court 1883. Lastly, learned counsel contended that the application by His Lordship of O 46 r 2(1)(a) of the RHC 1980 to the bankruptcy proceeding was in contravention of r 276 of the Bankruptcy Rules 1969 as it then existed which provided that 'save as provided by these Rules, the Rules of the High Court regulating the procedure in its civil jurisdiction shall not apply to any proceeding in bankruptcy'.

[26] Learned counsel submitted that upon the aforesaid deficiencies, the correctness of the decision is *Re V Gopal* was questionable, and ought not to be followed.

[27] In respect of *Wee Chow Yong* too, learned counsel submitted several deficiencies in the judgment. Firstly, he pointed out that the judgment in that case was obtained on 13 May 1982 and the bankruptcy notice was filed on 12 May 1988. The judgment creditor in that case was within six years from the date of the judgment when the bankruptcy proceeding was initiated. There was therefore no legal reason for the application of O 46 r 2(1)(a) of the RHC 1980. Hence, learned counsel contended that what was said by the learned judge on O 46 r 2(1)(a) of the RHC 1980, at best was obiter dicta. Next, learned counsel submitted that contrary to what the learned judge in that case

said, the provision under s 4(1)(g) of the English Bankruptcy Act 1883 was substantially different from the provision under s 3(1)(i) of the Malaysian BA 1967. Thirdly, according to learned counsel, although the learned judge did consider r 276 of our Bankruptcy Rules 1969, His Lordship decided that the said rule could not override the provision under s 3(1)(i) of the BA 1967. Learned counsel submitted that it might not be correct for His Lordship to ignore r 276 of the Bankruptcy Rule 1969 but applied O 46 r 2(1)(a) of the RHC 1980 to the bankruptcy proceeding before him. Fourthly, learned counsel submitted that the learned judge in *Wee Chow Yong* relied on the English case of *Woodall*. *Woodall and Re Ide*, were decisions on s 4(1)(g) of the English Bankruptcy Act 1883 which was different from the provision of s 3(1)(i) of the BA 1967. Learned counsel also contended that the factual matrix in *Woodall* and *Re Ide*, were different from the factual matrix in *Wee Chow Yong*. Lastly, learned counsel also contended that O 42 r 23 (a) of the Rules of the Supreme Court 1883 in England differed significantly from O 46 rr 1 and 2(1)(a) of the RHC 1980. Ending his submission on the first question, learned counsel questioned the reliance by subsequent cases on *Re V Gopal* and *Wee Chow Yong* which he submitted was not well founded. He implored this court to decide the issue fresh without relying on either *Re V Gopal* or *Wee Chow Yong*.

The respondents' submission

[28] The thrust of the submission of learned counsel for the respondents in support of the judgment of the Court of Appeal in the present appeals was that for a person to be deemed a 'creditor', he should first have in hand a final judgment or order within the ambit and meaning of s 3 of the BA 1967. Further, he should be a person entitled to enforce such final judgment. This, according to learned counsel was because s 3(1)(i) of the BA 1967 required that there should be no stay of execution on the final judgment. He submitted that the relevant case laws in various jurisdictions quite clearly said that before a judgment or order can be said to be a final judgment or order, it was not just necessary that there be no stay of execution of that judgment or order, but that the judgment or order must be capable of immediate execution at the time the bankruptcy notice was issued. In support of his submission learned counsel relied on *Low Mun v Chung Khiaw Bank Ltd* [1988] 1 MLJ 263, the majority decision of the Court of Appeal in *Tan Chwee Hock v AmBank (M) Bhd (previously known as AmFinance Bhd)*, *Re V Gopal, Wee Chow Yong, Woodall* and *Re Ide*.

[29] Learned counsel submitted that the words 'final judgment' in both s 3(1)(i) of the BA 1967 and the proviso thereof, referred to a judgment on which execution could be issued immediately, ie, at the point in time when bankruptcy notice was filed. The phrase 'a final judgment or order' in

bankruptcy jurisdiction means a judgment or order that is 'immediately executable' at the date of the issuance of the bankruptcy notice. Learned counsel argued that in the event a judgment has been recorded for a period of more than six years, leave pursuant to O 46 r 2(1)(a) of the RHC 1980 must first be obtained for, only then would the judgment become capable of immediate execution and therefore amount to a final judgment that could be enforced. Learned counsel submitted that the aforesaid line of reasoning was adopted in the Court of Appeal cases of *Chan Sin Lan v Delta Finance Bhd* [2004] 3 MLJ 178, *Tan Peng Hock v AmBank (M) Bhd Rayuan* [2011] MLJU 333; Sivil No B-03(IM)-235-10 (unreported), *Tan Ah Dek v AmBank (M) Bhd* Civil Appeal No B-03-90-10 (unreported) as well as the following cases which were referred to in the first leave question allowed by this court:

(a) *Re Liew Kong Ken; ex p Sucorp Enterprise Sdn Bhd* [1998] MLJU 416; [1998] 2 CLJ Supp 508 (HC);

(b) *Re Haji Ahmad bin Lazim & Ors; ex parte Bank Kerjasama Rakyat (M) Bhd* [1999] 5 MLJ 478 (HC);

(c) *Re Low Tung Kwai; ex p Perwira Affin Bank Bhd* [2001] 6 MLJ 39 (HC);

(d) *Tengku Iskandar bin Tengku Ahmad v Sime Bank Bhd* [2002] 1 MLJ 312 (HC);

(e) *Tan Ah Tong v Dato' Seri Dr Kuljit Singh* [2002] 6 MLJ 39 (HC); and

(f) *Re Lee Che Peh aka Lee Chee Peh; ex p Tractors Malaysia (1982) Sdn Bhd* [2003] 5 MLJ 463 (HC).

[30] On reliance by the appellant on *Lim Ah Hee*, learned counsel submitted that the judgment of this court in that case was obiter because the issues before the court did not concern O 46 r 2(1)(a) of the RHC 1980.

[31] In support of his submission, learned counsel also referred to ss 40(1)(g) and 40(3) of the Australian Bankruptcy Act 1966 which he contended were in pari materia with s 3(1)(i). On the effect of the aforesaid provisions in the Australian Bankruptcy Act, learned counsel referred to the decision of the Federal Court of Australia in *Abigroup Limited v Sennaro Abignano* (1992) 112 ALR 497 where the court opined that:

> The 1890 English enactment did not however affect the rule (established on the ground of necessary implication arising from the words 'execution thereon not having been stayed') that in order to issue a bankruptcy notice the judgment creditor must be in a position to issue execution. Thus, although the 'person who is for the time being entitled to enforce a final judgment' was thereafter taken to include a person who had not himself obtained the judgment, nevertheless he had to be a person who had taken all steps which entitled him to reap the fruits of the judgment. Thus, the legal personal representative of a judgment creditor could still not be

A treated as a creditor who had obtained a final judgment unless he had obtained leave under the court's rules to issue execution: *Woodall*. Nor could the trustee in bankruptcy of a judgment creditor be so treated until he obtained such leave, even though he had obtained the usual order to carry on the proceeding: *Re Clements* [1901] 1 KB 260; see *Wace* at 42. Also, where under the relevant English Rules of
B Court execution on a judgment against a firm could not be issued against a particular partner without leave of the court, a bankruptcy notice could not be issued against that partner based on the judgment until the leave had been obtained: see *Ide*.

…

C The words 'execution thereon not having been stayed' apply not only to cases where there is an express stay by order of the court, but also to cases of an implied stay where a creditor has taken some step to enforce the judgment, but from the particular circumstances of the case and steps taken by him no further execution can be levied. As to the circumstances which can so apply see *Potter*, *Adams* and *Dickson*,
D pp 66–71.

…

Woodall, *Ide* and *Re Richards; ex parte Sommers* (1947) 14 ABC 112 are all examples of numerous cases where execution had not been stayed, but the judgment creditor
E had not put himself in the position of being able to issue execution, so execution was deemed or considered to be stayed on the ground that he was not entitled at the date of the issue of the bankruptcy notice to issue immediate execution on the judgment; see also *Re Pannowitz* at 291.

…

F These are the well established principles referred to in a long line of cases and accepted by many of the early writers on bankruptcy law. It is against this background that we now examine whether the appellant is a creditor who has obtained a final judgment against the respondent upon which execution has not been stayed.

G

[32] According to learned counsel, *Abigroup Limited* was followed by *Cawood v Cowood* [2000] FCA 1786.

H DECISION

[33] For reasons which we will set out in a moment, we are unable to accept the submission of learned counsel for the respondents.

I **[34]** The first question on which leave to appeal was granted by this court brings into focus again the interpretation and the application of s 3(1) of the BA 1967. A prerequisite to the initiation of a bankruptcy proceeding is that the debtor must have committed one of the acts of bankruptcy provided under s 3(1) of the BA 1967. Section 3(1)(i) which concerns the present appeal

provides for an act of bankruptcy often invoked in bankruptcy proceedings. Under this section a debtor commits an act of bankruptcy if a creditor who has obtained a final judgment against him for any amount, and execution thereon not having been stayed, has served on the debtor a bankruptcy notice, and the debtor has failed to comply with the requirements of that notice within seven days of it being served on him. The section provides:

> (i) *if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been staved has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act reguiring him to pay the judgment debt* or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:
>
> *Provided that for the purposes of this paragraph and of section 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order*: (Emphasis added.)

[35] It is the interpretation and effect of the phrase 'if a creditor has obtained a final judgment or order … and execution thereon not having been stayed' in that section and the phrase, 'any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be creditor who has obtained a final judgment or final order' in the proviso to the section that lies at the heart of the present appeals.

[36] In support of his submission on the effect of s 3(1)(i) of the BA 1967 learned counsel for the respondent among others relied on the Australian case of *Abigroup Limited*. On this, we need only say that the relevant bankruptcy provisions in Australia — ss 40(1)(g), 40(3)(d)–(e) and 41(3)(b)–(c) of the Australian Bankruptcy Act 1967 are not in pari materia with the provision under s 3(1)(i) of the BA 1967. Besides, unlike the present appeals, *Abigroup Limited* is not a case concerning the leave to issue execution on a judgment more than six years after it was given. Thus, *Abigroup* does not assist the respondent's case significantly. More useful guides on the interpretation of s 3(1)(i) of the BA 1967 are to be sought from local cases.

[37] It appears to us that in the interpretation of s 3(1)(i) of the BA 1967, the High Court cases referred to in para (ii) of the first leave question, namely, *Liew*

Kong Ken, Re Haji Ahmad, Re Low Tung Kwai, Tengku Iskandar, Tan Ah Tong and Re Lee Che Pah relied upon *Re V Gopal* and/or *Wee Chow Yong*. Even the Court of Appeal case of *Chan Sin* (also referred to in the para (ii) of the first leave question and the Supreme Court case of *Low Mun* relied upon *Re V Gopal* and *Wee Chow Yong*. In its judgment (unreported) in *Tan Peng Hock*, the Court of Appeal also relied on *Re V Gopal* and *Wee Chow Yong*. The judgment of the Court of Appeal (unreported) in *Tan Ah Dek* also makes reference to *Re V Gopal* and *Wee Chow Yong* and it seems that the eventual decision of the court in *Tan Ah Dek* was based on the principles distilled from the two cases. So, it is only appropriate that *Re V Gopal* and *Wee Chow Yong* be dealt with in some detail. More of this later. In the meantime reference must be made to *Low Mun* and *Chan Sin*. First *Low Mun*. The case was not concerned with the issuance of bankruptcy notice upon a judgment more than six years after it was given. The main issue for the determination of the court was whether a bankruptcy notice for a sum of RM2,325,000 and for unspecified amount of interest and cost was a good notice upon which bankruptcy proceeding may be found. We therefore agree with the submission of learned counsel for the appellant that the following remark of the Supreme Court was obiter:

> It is also essential that at the time of issue of the bankruptcy notice, the judgment creditor must be in the position to issue execution — see *In re Woodall, ex parte Woodall* (1884) 13 QBD 479. If part of the debt has been paid or unenforceable in bankruptcy, the notice can only be issued for the balance — see *Re A Debtor* [1938] 2 All ER 824. Thus, a bankruptcy notice can only be issued for the judgment debt or that part of the debt on which the creditor can issue execution.

Chan Sin is in no better position. In *Chan Sin*, following *Re V Gopal* and *Wee Chow Yong*, the Court of Appeal opined that a creditor who has obtained a judgment and sat on it for more than six years in West Malaysia must obtain leave of court before he can commence bankruptcy proceedings under s 3(1)(i) of the BA 1967. However, the critical issue before the court was whether the judgment obtained was affected adversely by a period of limitation under the Sarawak Limitation Ordinance. The opinion of the court on the need to obtain leave to commence bankruptcy proceeding upon a judgment more than six years after it was obtained was therefore obiter.

RE V GOPAL

[38] According to the learned judge in that case, the question which arose before him was whether an act of bankruptcy could be said to have been committed where s 3(1)(i) of the BA 1967 was relied on, but where the bankruptcy notice was caused to be *issued* a few days *before* six years had lapsed from the date of the final judgment which notice was only *served* a few days *after* six years had lapsed. His Lordship referred to O 46 r 2(1)(a) of the RHC 1980 by virtue of which a writ of execution to enforce a judgment or order may not issue without leave of court where six years or more had lapsed since the

date of the judgment or order. His Lordship then referred to *Re Ide*, and *Woodall*, which His Lordship held to be applicable to the case before him because according to him, s 4(1)(g) of the English Bankruptcy Act 1883 (which had been interpreted in the two English cases), was in pari materia with s 3(1)(i) of the BA 1967. Then His Lordship held that on the date the bankruptcy notice was served on the debtor, the creditor did not have a judgment on which execution could be proceeded with since to do so, by O 46 r 2(1)(a) of the RHC 1980, leave of court had first to be obtained, and that on that date the creditor did not have a final judgment within the meaning of s 3(1)(i) of the BA 1967. This is what the learned judge said:

> The question that arose in this matter is whether an act of bankruptcy could be said to have been committed where s 3(1)(i) was relied on but where the bankcruptcy notice was caused to be *issued a few days before six* years had lapsed from the date of the relevant final judgment which notice *was only served a few days after six years had lapsed*.
>
> By O 46 r 2(1)(a) of the Rules of the High Court a writ of execution to enforce a judgment or order may not issue without leave of the court where six years or more have lapsed since the date of the judgment or order.
>
> In the judgment of the English Court of Appeal in *ex parte Ide* (1886) 17 QBD 755 it was held that when a creditor has obtained judgment against a firm but has not obtained the requisite leave of court to issue execution against a person alleged to be a member of the firm, he cannot effectively serve such a person with a bankruptcy notice. Section 4(1)(g) of the relevant English Bankruptcy Act is in pari materia with our s 3(1)(i). Lord Esher MR said at p 759 of the report,
>
> > *It is true that in the present case execution on the judgment has not been staved, but the words seem to me necessarily to imply that the judgment must be one upon which execution could go immediately, unless it was stayed. But here execution cannot go immediately whether it is staved or not; it cannot go without the leave of the Court.*
>
> In the same case Fry LJ at p 760 referred to what Lindley LJ had said in an earlier decision of the Court of Appeal *ex parte Woodall* 13 QBD 479 at 483:
>
> > The words 'execution thereon not having been stayed' shew clearly what sort of a creditor is intended. It must be a creditor who is in a position to issue execution on the judgment …
>
> Fry LJ in agreeing with the view of Lindley LJ went on to say,
>
> > It would be very strange if the enactment were that a bankruptcy notice could not be issued when execution on the judgment had been stayed, and yet that a bankruptcy notice could be issued when execution could not go at all without the leave of the court, and the proceedings had not been stayed simply for that reason.

The principle expressed in those two English cases equally apply in the instant case. On the date that the bankruptcy notice was served on the debtor the creditor did not have a judgment on which execution could he proceeded with since to do so, by

A O 46 r 2(1)(a) leave of court had first to be obtained and that therefore on that date the creditor did not have a final judgment within the meaning of s 3(1)(i).

[39] Next His Lordship agreed that bankcruptcy proceedings were not execution proceedings. Nevertheless, he went on to hold that:

B

> However, that is no answer to the application of s 3(1)(i) to decide whether the creditor had on the day the bankruptcy notice was served a final judgment within the meaning of the said subsection without which the bankruptcy notice would be bad.
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> C
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> What the proviso to s 3(1)(i) does is to define a creditor who has obtained a final judgment or final order within the meaning of that section as being 'any person who is for the time being entitled to enforce a final judgment or final order'. On the day that the bankruptcy notice *was served*, since six years had lapsed from the date of the judgment the petitioner was not entitled to enforce the judgment as he had not
>
> D
>
> obtained the requisite leave as prescribed by O46 r 2(1)(a).

[40] Now, in the first place, the proviso to s 3(1)(i) of BA 1967 *does not define* a creditor who has obtained final judgment or final order within the meaning
E of that section 'as any person who for a time being entitled to enforce a final judgment or a final order' in s 3(1)(i) of the BA 1967. In my view what the proviso does is to provide a presumption for the purpose of determining 'a creditor' under ss 3(1)(i) and 5 of the BA 1967. Anyway, the more important thing is that His Lordship cited no reason for the necessity of referring to the
F provision relating to a writ of execution under O 46 rr 1–2 of the RHC 1980 in construing 'entitled to enforce a final judgment' in the proviso to s 3(1)(i) of the BA 1967. Why must reference be made to O 46 r 2 of the RHC 1980?. The learned judge opined that the principle expressed in *Re Ide*, and *Woodall* equally apply in the case before him, because in his view, s 3(1)(i) of the BA 1967 was
G in pari materia with s 4(1)(g) of the English Bankruptcy Act 1883. As will be demonstrated shortly that is not so. This brings us to *Wee Chow Yong*.

WEE CHOW YONG

H **[41]** On 9 June 1988, the judgment creditor, who obtained a final judgment, caused to be served upon the judgment debtor a bankruptcy notice which the latter had not complied with within seven days after service as required under s 3(1)(i) of the BA 1967. The judgment debtor sought to impugn the bankruptcy notice on the ground that it had been issued on 12 May 1988
I although the judgment debt upon which it was based was dated 13 May 1982. It was said that the proceedings in bankruptcy had been commenced more than six years after judgment had been obtained without the leave of the court as required under O 46 r 2(1) of the RHC 1980. On behalf of the judgment creditor it was argued that r 276 of the Bankruptcy Rules 1969 expressly

provided that RHC 1980 shall not apply to any proceeding in bankruptcy, and that accordingly, since there was no requirement in the Bankruptcy Rules 1969 that leave was required to commence bankruptcy proceedings founded on a judgment entered more than six years previously, no leave was required. In his judgment the learned judge said:

> In *re Ide, ex parte Ide* (1886) 17 QBD 755 the creditor had obtained judgment a firm and had purported to issue a bankruptcy notice founded on that judgment against an individual partner. By s 4(1)(g) of the Bankruptcy Act 1883, the statutory predecessor of the Bankruptcy Act 1914, *it was a condition for the validity of a bankruptcy notice founded on a final judgment or final order that execution had not been stayed thereon*. The Court of Appeal held that on a proper construction of the subsection, to entitle a creditor to issue a bankruptcy notice he must be in a position to issue execution on his judgment at the time when he issued his bankruptcy notice.
>
> *In other words — I would interpolate — in addition to there being no stay on the judgment there must be no other impediment to issue execution on the judgment. Accordingly, O XLII r 10(c) of the RSC (the predecessor of the present O 81 r 5(4) reauirina the leave of the court to issue execution, was held to be such an impediment.*
>
> In *Woodall*, *ex parte Woodall* 13 QBD 479 one Houlston had recovered a final judgment against Woodall. Houlston then died and his executrix served a bankruptcy notice on Woodall without obtaining leave of the court under r 23 of O XLII of the RSC 1883 to issue execution on the judgment. The bankruptcy notice not having been complied with, the executrix presented a bankruptcy petition. The registrar made a receiving order.
>
> On appeal, the question for decision was whether the executrix was a 'creditor' within the meaning of s 4(1)(g) of the Bankruptcy Act 1883.
>
> It was argued that the representative of the person who originally obtained the final judgment does not fill the character of creditor under sub-s 1(g), if he has not obtained leave under r 23 to issue execution.
>
> In upholding that submission, Bagally LJ said:
>
> > But those words ('and execution thereon not having been stayed') in sub-s 1(g) tend to show that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment. The original creditor is in that position, if the person who applies for the notice is the executor of the original judgment creditor he does not, as I read the subsection, fill the required character until he has obtained leave to issue execution on the judgment.
>
> The cases of *In Re Ide* and *ex parte Woodall* have stood unchallenged for more than 100 years and I take it that they represent the law on the point concerned.
>
> To my mind, it is not unfair summary of the position in the UK to say that a creditor can issue a bankruptcy notice only when he has obtained a final judgment or final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with the leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

[42] In his judgment, the learned judge did not explicitly state his opinion on s 3(1)(i) of the BA 1967. What His Lordship did upon his analysis of *Re Ide* and *Woodall*, was to state what in his view was the position in the UK, which according to him was as follows:

> A creditor can issue a bankruptcy notice only when he has obtained final judgment or order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with the leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

[43] The learned judge later said that the UK decisions were of direct relevance when construing s 3(1)(g) of on local Act (should be s 3(1)(i)) and that he would respectfully follow them. His Lordship then said, 'accordingly I must next consider whether at the material time the judgment creditor in this case was in a position to issue execution of the judgment? The question arises, what is the material time?' His Lordship held that since as mentioned in the opening paragraph of his judgment, the judgment debt was dated 13 May 1982 and the bankruptcy notice upon which it was grounded was issued on 12 May 1988, it was still within the six year time limit imposed by O 46 r 2(1) of the RHC. There was therefore no need for leave to issue execution against the judgment debtor at the time of the issue of the bankruptcy notice. Pausing here for a moment, assuming that O 46 r 2(1) of the RHC applied to the interpretation of s 3(1)(i) of the BA 1967, if at the outset of the case (as is revealed in the judgment), it was clear from the facts that the judgment debt was still within the six year time imposed by O 46 r 2(1) of the RHC, was it necessary for His Lordship to consider whether the judgment creditor was in the position to issue execution of the judgment? It came as no surprise that it was contended on behalf of the appellant that the opinion of the learned judge on the point of s 3(1)(i) of the BA 1967 was obiter.

[44] In *Re Ide*, the issue was whether a creditor who had obtained a judgment against a firm of partnership could issue a bankruptcy notice against a partner of the firm without obtaining the leave of court. It was held that where a creditor had obtained judgment against a firm, but had not obtained the requisite leave under O 42 r 10 of the Rules of the Supreme Court 1883 to issue execution against a person alleged to be a member of the firm, he could not serve such person with a bankruptcy notice under s 4(1)(g) of the Bankruptcy Act 1883 which enabled a creditor who had obtained final judgment against a debtor, 'execution thereon not having been stayed' to issue the notice requiring the debtor to pay the debt. Section 4(1)(g) of that Act provides:

> A debtor commits an act of bankruptcy in each of the following cases:

(g.) If a creditor has obtained a final judgment against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt in accordance with the terms of the judgment.

[45] Order 42 r 10 of the English Rules of the Supreme Court 1883 reads as follows:

Where a judgment or order is against a firm, execution may issue:

(a) Against any property of the partnership;

(b) Against any person who has appeared in his own name under Order XII, r 15, or who has admitted on the pleading that he is, or who has been adjudged to be a partner;

(c) Against any person who has been served as a partner, with the writ of summons, and has failed to appear.

If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm, he may apply to the Court or a judge for leave so to do: and the Court or judge may give such leave if the liability be not disputed, or, if such liability be disputed, may order that the liability of such person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

[46] It was held that the judgment obtained against the firm was a final judgment and that execution could immediately issue against the property of the firm. In his judgment Lord Esher MR said:

A judgment has been obtained against Ide & Co, that is, against the firm, whether regularly obtained or not I do not stop to inquire, and, as against the firm, it was in my opinion a final judgment. That judgment having been obtained, by O XLII, r 10, execution could immediately issue against the property of the firm.

However, regarding Leon M Ide — a member of the firm His Lordship said:

The meaning of the two rules taken together is, I think, this: if you obtain a judgment against a firm, you may then issue execution against the property of the firm, but you cannot issue execution against the private property of any member of the firm without the leave of the court, unless that member has been actually served as a partner with the writ of summons, or unless he has appeared in his own name, or unless he has admitted on the pleadings that he is, or has been adjudged to be, a partner. Unless he is in one of those categories, leave must be obtained to issue execution against his private goods. *That is exactly the position of Leon M Ide. A judgment has been obtained against the partnership firm, but he has not been served with the writ within the meaning of cl (c) of r 10. for that refers to a person who has been actually served with the writ. He has not been personally served with the writ. Neither has he appeared in his own name, or admitted that he is. or has been adjudged to be. a*

> *partner. Execution against his private goods could not therefore go without the leave of the court, and, therefore, although there has been a judgment against the firm, and against him as a member of the firm, yet execution cannot go against him, that is. against his goods by seizure of them, without the leave of the court*. He is a person against whom a creditor had obtained a final judgment, but against whom the creditor could not issue execution without leave.
>
> Under these circumstances, is he a person against whom, under s 4, sub-s 1(g), of the Bankruptcy Act, a bankruptcy notice can be issued, upon failure to comply with which he can be made a bankrupt? Sub-s 1(g) says: 'If a creditor has obtained a final judgment against him' (that is against the person whom he proposes to make bankrupt) 'for any amount, and, execution thereon not having been stayed,' has served on him a bankruptcy notice. *It is true that in the present case execution on the judgment has, not been staved, but the words seem to me necessarily to imply that the judgment must be one upon which execution could go immediately*, unless it was stayed. But here execution cannot go immediately whether it is stayed or not; it cannot go without the leave of the court. I think, therefore, that this was not a final judgment such as is described in sub-s 1(g) on which a bankruptcy notice could issue.

In other words, the rule is, even if there is no stay in the sense that there is no stay of execution granted by court, if execution upon the judgment could not go immediately, a stay will be implied. But there was no elaboration why the implication that the judgment must be one upon which execution could go immediately, unless it was stayed must be read into the phrase 'if a creditor has obtained a final judgment against him and execution thereon not having been stayed' under s 4(1)(g)? However His Lordship explained why he decided the case as such:

> I *decide this case, not by reason of any previous authority which is binding on this court, for I do not think there is one, but in accordance with what seems to have been the view of the court, or at all events seems to have been in the minds of the judges, although they were not then called upon to decide the point, in the two cases* which have been referred to. On the true construction of sub-s 1(g) I think the appellant was not a person against whom this bankruptcy notice could properly issue, and therefore his appeal must be allowed.

[47] So, it was not because there was any existing binding authority on the point, but according to what seemed to His Lordship to be the view of the court or to be in minds of the judges at that time. Why the court or the judges formed that view was not clear from the judgment. One of the two cases referred to in the aforesaid passage of Lord Esher's judgment was *Woodall*.

[48] The interpretation of s 4(1)(g) of the Bankruptcy Act 1883 came earlier before the English Court of Appeal in *Woodall*. The question before the court was whether the wife of a deceased judgment creditor was a creditor within the meaning of s 4(1)(g) of the Bankruptcy Act 1883, to entitle her to issue a bankruptcy notice in respect of a judgment obtained by her late husband. In

answering the question, the court referred to O 42 r 23 of the English Rules of the Supreme Court 1883 which provided:

> 23. In the following cases, viz.:
>
> (a) *Where six years have elapsed since the judgment or date of the order*, or any change has taken place by death or otherwise in the parties entitled or liable to execution;
>
> (b) Where a husband is entitled or liable to execution upon a judgment or order for or against a wife;
>
> (c) Where a party is entitled to execution upon a judgment of assets in future;
>
> (d) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or other person representing such company;
>
> *the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly*. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just.

[49] The court held that it it was only the original creditor (the deceased judgment creditor) who could issue a bankruptcy notice without the leave of court. In his judgment Bagally LJ said:

> The question is, whether the respondent is a 'creditor' within the meaning of sub-s 1(g). The receiving order was made on the assumption that she, as the executrix of the deceased judgment creditor, was in effect a creditor who had obtained a final judgment against the debtor. The objection is that, as she is not the person who actually obtained the final judgment, it is essential that she should first have obtained leave from the court, under r 23 of Order XLII, to issue execution on the judgment. It is contended by Mr Woolfthat there is nothing in sub-s 1(g) to limit the generality of the expression, 'a creditor who has obtained a final judgment', and that it must include the representative of the original creditor after his death, and his assignee. On the other hand, it is contended by the appellant that the representative of the person who originally obtained the final judgment does not fill the character of creditor under sub-s 1(g), if he has not obtained leave under r 23 to issue execution. If it were not for the words which immediately follow, 'and execution thereon not having been stayed', I think there would have been strong ground for adopting Mr Woolfs view. *But those words tend to shew that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment. The original creditor is in that position, if there has been no stay of execution. If the person who applies for the notice is the executor of the original judgment creditor he does not as I read the sub-section, fill the reguired character until he has obtained leave to issue execution on the judgment*. On this ground I think that the appeal must be allowed, and the receiving order be discharged.

[50] From what has been said thus far it is clear that at the time *Re Ide*, and *Woodall* were decided, s 4(1)(g) of the Bankruptcy Act 1883 did not contain the proviso similar to the proviso to s 3(1)(i) of the BA 1967. The proviso was added later on 18 August 1890. So, contrary to what was said by learned judge in *Re V Gopal*, (and *Wee Chow Yong*) s 3(1)(i) of the BA 1967 was not in pari materia with s 4(1)(g) of the English Bankruptcy Act 1883 at the time when *Re Ide* and *Woodall* were decided. Secondly, it is also clear that in *Re Ide* and *Woodall*, the judgment creditors were held not to be in the position to execute immediately, hence they were not creditors within the meaning under s 4(1)(g) of the Bankruptcy Act 1883, not on account of their failure to apply for leave to execute judgment after six years from the date of the judgment. Both cases had nothing to do with that. As would be recalled, in *Re Ide* the judgment creditor who had obtained judgment against a firm of partnership, did not have the requisite leave from the court to enforce the judgment against a partner of the firm. In *Woodall*, the wife of the deceased judgment creditor did not have the requisite leave to issue execution on the judgment obtained by her deceased husband. So, in our view it is questionable whether the two cases are appropriate authorities to support the decision of the High Court in *Re V Gopal*, and indeed the later case of *Wee Chow Yong*. Another matter which in our view underminds the appropriateness of *Re V Gopal* as an authority for the interpretation of s 3(1)(i) of the BA 1967 is this. In *Re V Gopal*, the learned judge found that the bankruptcy notice was caused to be *issued* a few days *before* six years had lapsed, but was only served a few days *after* six years had lapsed. His Lordship held that on the day the bankruptcy notice *was served*, since six years had lapsed from the date of the judgment, the petitioner was not entitled to enforce the judgment as he had not obtained the requisite leave as provided under O 46 r 2(1)(a) of the RHC 1980. With respect, even assuming that he was right in applying O 46 r 2(1)(a) of the RHC in that case, the relevant date for determining whether the creditor was in a position to issue execution on the judgment would be the date of *issue* of the bankruptcy notice, not the date of its *service* (see *Wee Chow Yong*). In other words, if the learned judge had not held the way he did, the judgment creditor was within the six year period, and thus the discussion and the eventual decision whether he was a creditor under s 3(1)(i) of the BA 1967 would not have been necessary.

[51] Another significant point about the appropriateness of applying O 46 r 2 of the RHC in interpreting s 3(1)(i) of the BA 1967 as was done in *Re V Gopal* and *Wee Chow Yong* is the effect of r 276 of the Bankruptcy Rules 1969. Before being amended with effect from 1 April 1993 by the Bankruptcy (Amendment) Rules 1993 [PU(A)60/1993] r 276 provides:

> Save as provided by these Rules, the Rules of the High Court regulating the procedure in its civil jurisdiction *shall not apply* to any proceeding in bankruptcy.

[52] *In Re V Gopal* this provision was not referred to and considered by the High Court. However, in *Wee Chow Yong*, the said provision was cited by learned counsel for the judgment creditor in support of his submission urging the court to decline to follow *Re Ide* and *Woodall*:

> It was urged upon me by counsel for the judgment creditor that I should decline to follow the cases of *In re Ide* and *ex parte Woodall* because in this country unlike in UK, we have *r 276 of the Bankruptcy Rules 1969 (BR)* which expressly provides that the Rules of the Supreme Court (now *the Rules of the High Court 1980*) regulating the procedure in it's civil jurisdiction shall not apply to any proceedings in bankruptcy. Accordingly, it was submitted that there being no requirement in the BR that leave was required for commencing bankruptcy proceedings founded on a judgment entered more than six years previously, no such leave was required. As such, the only bar to the commencement of bankruptcy proceedings would be if and when a judgment creditor is barred by s 6(3) of the Limitation Act 1953 — so ran counsel's submission.

[53] In dismissing the submission as unacceptable, the learned judge said:

> I regret I find counsel for the judgment creditor's submission regarding this part of the case unacceptable. In my opinion, the overriding consideration here is, as I have indicated, the proper interpretation *of s 3(1)(i) of our Act*. I am not at liberty to brush aside the explicit provisions *of s 3(1)(i)* merely because of *r 276 of the BR*. Accordingly, if there is any conflict between these two measures I would regard *s 3(1)(i)* as having overriding effect since it ranks as principal legislation whereas the BR are subsidiary legislation (see s 23(1) of the Interpretation (States of Malaysia) Act 1967). In my view, therefore the UK decisions are of direct relevance when construing *s 3(1)(g) of our Act* and I would respectfully follow them.

[54] With respect we also find it difficult to accept the view of the learned judge that there was a conflict between s 3(1)(i) of the BA 1967 and r 276 which was made pursuant to s 123 of the BA 1967. In fact the application of O 46 r 2(1)(a) of the RHC 1980 seemed to be contrary to the provisions of r 276 of the Bankruptcy Rules 1969.

[55] The application of O 46 r 2(1)(a) of the RHC 1980 was based on *Re Ide* and *Woodall*. This brings us to another reason why the reliance on the two English cases is questionable. Apart from the difference between s 3(1)(i) of the BA 1967 and s 4(1)(g) of the English Bankruptcy 1883 as it then existed, O 42 r 23 of the English Supreme Court Rules 1883 (which we have set out elsewhere in this judgment) is, in our view, not similar to O 46 rr 1–2(1) of the RHC 1980 which provides as follows:

A 1 Definition (O 46 r 1)

In this Order, unless the context otherwise requires, '*writ of execution' includes a writ of seizure and sale, a writ of possession and a writ of delivery*.

2 When leave to issue any writ of execution is necessary (O 46 r2)

B (1) *A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say*.:

(a) *where six years or more have lapsed since the date of the judgment or order;*

(b) where any change has taken place, whether by death or otherwise, in the parties entitled or liable to execution under the judgment or order;

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(c) where the judgment or order is against the assets of a deceased person coming to the hands of his executors or administrators after the date of the judgment or order, and it is sought to issue execution against such assets;

(d) where under the judgment or order any person is entitled to relief subject to the fulfilment of any condition which it is alleged has been fulfilled;

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(e) where any movable property sought to be seized under a writ of execution are in the hands of a receiver appointed by the Court.

E **[56]** In view of O 46 r 2(1)(a) of the RHC 1980 which provides for specific modes of executing, with the leave of court, judgments exceeding six years since the date they were given, namely, by writ of seizure and sale, writ of possession and writ of delivery (see O 45 r 1), it is questionable whether the decision in *Woodall* (followed by *Re Ide*) which applied O 42 r 23(a) of the English Rules of Supreme Court 1883 in the interpretation of the words 'creditor' in s 4(1)(g) of the English Bankruptcy Act 1883 is the appropriate authority on the interpretation of the word 'creditor' in s 3(1)(i) of the BA 1967.

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[57] The decision of the Court of Appeal in *Tan Peng Hock*, one of the cases relied upon by learned counsel for the respondent in support of his submission, reiterates in substance the views expressed in the cases referred to in para (ii) of the first leave question in the present appeals. In its judgment (unreported), the Court of Appeal declined to follow *Lim Ah Hee*, which it held to be obiter. It approved *Re V Gopal* and *Wee Chow Yong* and relied upon *Re Ide* and *Woodall*. It said:

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> [11] In our respectful view, *V Gopal* and *Wee Chow Yong* were correctly decided. Even though bankruptcy proceedings are not execution proceedings, when a challenge is made to a bankruptcy notice on the grounds as was done here, the issue before the court is not whether bankruptcy proceedings are execution proceedings and therefore since bankruptcy proceedings are not execution proceedings, no leave of court is required under O 46 r 2 of the RHC before a bankruptcy notice is issued out based on a judgment which is more than six years old. In our view the critical issue which the court has to decide on when such a challenge is made is whether the creditor who has issued out the bankruptcy notice is a creditor who has obtained a

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final judgment or order within the meaning of that section, in that, he is a creditor who has obtained a final judgment against the debtor and 'execution thereon not having been stayed' and the creditor is a 'person who is for the time being entitled to enforce' the final judgment on which the bankruptcy notice is based because by the very words used in s 3(1)(i) itself, if for some reason the judgment has been stayed or the creditor cannot for the time being enforce that judgment, then the proviso to s 3(1)(i) states that he is not a creditor who has obtained a final judgment within the meaning of that section.

[12] To answer the critical issue before it the court would have to interpret the words 'and execution thereon not having been stayed' with reference to the final judgment upon which a bankruptcy notice is based. In doing so the court is assisted by the decision in the cases of *ex p Woodall* and *ex p Ide* where those same words, which are found in s 4(1)(g) of the UK Bankruptcy Act 1883, were interpreted. In *ex p Woodall* those words came up for interpretation in the context of a case where the original creditor who had obtained the judgment against the debtor, died. His executrix then issued a bankruptcy notice based on that judgment. The court held that the executrix did not occupy the same position as the original creditor and therefore was not a person who was in a position to issue execution upon a final judgment, unless the executrix first obtained leave of court to do so. Bagally LJ at p 482 said:

> It is true in the present case execution on the judgment has not been stayed, but those words point to this, that the creditor must be in a position to issue execution. The executrix has not obtained the final judgment, and she is not in a position to issue execution on it

[13] In the same case Lindley LJ said:

> The words 'execution thereon not having been stayed' show clearly what sort of a creditor is intended. It must be a creditor who is in a position to issue execution on the judgment

[14] In *Ex P Ide* those same words came up for consideration again in the context of a case where judgment had been obtained against a firm. But a bankruptcy notice was issued against an individual partner of the firm. The court there held that the creditor was not in a position to issue execution on his judgment because under the English Rules of Court you require leave of court to execute a judgment against individual partners of a firm. In arriving at that decision Lord Esher MR said this about the words: 'and execution thereon not having been stayed':

> It is true in the present case execution on the judgment has not been stayed, *but the words seem to me necessarily to imply that the judgment must be one upon which execution could go immediately, unless it was stayed*. But here execution cannot go immediately whether it is stayed or not; it cannot go without the leave of court.

A [15] In the same case Bowen LJ Said:

> *We must look carefully at the words to see if there is not an implication to be found in them, and it seems to me that, from the collection of the words 'final judgment'and execution thereon not having been stave. a necessary implication arises of this character, viz.; that the creditor must not merely have obtained a final judgment but must be in a position to issue immediate execution upon it*.

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[16] In the same case Fry LJ said:

> The words 'execution thereon not having been stayed show clearly what sort of a creditor is intended. It must be a creditor who is in a position to issue execution.

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Whereas the English courts had to read into the words 'and execution thereon not having been stayed' the meaning which they gave to those words, we do not have to do so as the proviso to our s 3(1)(i) clearly states that any person who is for the time being entitled to enforce a final judgment, shall be deemed to be a creditor who has obtained a final judgment or order. In other words, *if the person is not for the time being entitled to enforce a final judgment, then he is not a creditor who has obtained a final judgment or order within the meaning of s 3(1)(i) and cannot commence bankruptcy proceedings on that judgment*. We should further add that the cases of *ex p Woodall* and *ex p Ide* are but examples of the different ways in which a judgment may become stayed. In our case here the judgment has become stayed for a different reason. Here the respondent was not in a position to enforce its judgment against the appellant without the leave of court under O 46 r 2 as more than six years had lapsed from the date of judgment.

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[58] With respect we have a different view. As we have said, the answer to the first leave question depends on the interpretation to be given to the phrase 'if a creditor has obtained a final judgment or order … and execution thereon not having been staved' in s 3(1)(i) of the BA 1967, and the phrase, 'any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order' in the proviso to the section. At the time *Woodall* and *Re Ide* were decided, there was no proviso (equivalent to the proviso to s 3(1)(i) of the BA 1967) under s 4(1)(g) of the English Bankruptcy Act 1883. *Woodall* and *Re Ide* interpreted the phrase 'if a creditor has obtained a final judgment or final order and execution thereon not having been staved' under s 4(1)(g) of the Bankruptcy Act 1883 to mean that even if the judgment had not been stayed, the phrase implied that the judgment must be one upon which execution could go on immediately. In effect it means if execution could not go on immediately upon the judgment, a stay will be implied. In other words apart from there being no express stay by the court upon a stay application, there should not be any other impediment to issue execution on the judgment. If there is an impediment, a stay is implied. This is where the interplay of the provisions in the Rules of Court relating to execution with leave of court (as illustrated in the factual

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situations in *Woodall* and *Re Ide*) and s 4(1)(g) of the Bankruptcy Act 1883 was applied by the English Court of Appeal in *Woodall* and *Re Ide*. The question is must implication be read into the phrase 'if a creditor has obtained a final judgment or final order … and execution thereon not having been staved' under s 3(1)(i) of the BA 1967?. Must a strained interpretation as aforesaid be given to our s 3(1)(i) when there is a proviso to that section to assist in the interpretation of 'creditor' in that section. The proviso is in the form of a presumption. If a person can establish that he is a 'person who is for the time being entitled to *enforce a final* judgment or final order' then he 'shall be deemed to be a creditor who has obtained a final judgment or final order'. The use of the words 'entitled to enforce' instead of 'entitled to execute' is to our mind deliberate. The crucial question then is, who is a person who is entitled to enforce a final judgment or final order? This is where to our mind the decision of this court in *Lim Ah Hee* is instructive. In *Lim Ah Hee* in delivering the judgment of this court, Abdul Hamid Mohamed FCJ said that:

> clearly a bankruptcy notice or a bankruptcy petition cannot be a 'writ of execution'. So, in my view, our courts have been correct in holding the view that no leave of court is necessary to issue a bankruptcy notice after six years as required by O 46 r 2 of the RHC 1980.

[59] In our view, that statement albeit obiter, being a judicial pronouncement emanating from the highest court in the country, deserves utmost respect. More importantly however, there is another part of His Lordship's judgment which we find very relevant and indeed conclusive in answering the question who is a person who is entitled to enforce a final judgment? This was when His Lordship dealt with the issue whether a bankruptcy proceeding is an 'action' within the meaning of s 6(3) of the Limitation Act 1953 as defined in s 2 of the same Act:

> We have seen from the decided cases and I agree that a bankruptcy proceeding is not 'a writ of execution' within the meaning of *O 46 r 2 of the RHC 1980*. But, that does not necessarily mean that it is therefore 'an action' within the meaning of s 6(3). We still have to consider the meaning of 'an action upon any judgment' in the light of the definition given in s 2 of the Limitation Act 1953 that includes 'a suit or any other proceeding'.
>
> Of course, by merely looking at the word 'action' in s 6(3) it appears that the word 'action' does not include a bankruptcy proceeding. It is also clearly not a 'suit', one of the words used in the definition of the word 'action' in s 2. But, is it not a 'proceeding in a court of law' 'upon any judgment' (I am reading the provisions in ss 2 and 6(3) together).
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> *I do not think that it can be argued that a bankruptcy proceeding is not proceeding in court. Neither can it be argued that it is not based upon a judgment. There has to be a judgment before a bankruptcy proceeding can be commenced. Then going by the definition of 'action' in s 2, it is an 'action' and an action upon a judgment.*

A question then may be asked: on the same reasoning, is an 'execution' not a 'proceeding in court'? Of course it is a proceeding in court but, *I think, the distinction lies in the fact that execution is the continuation of the existing proceeding to enforce the judgment provided by the same rules of court, the RHC 1980. On the other hand, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee. The fact that it is based on a judgment does not necessarily make it a continuation of the existing proceeding*.

Section 6(3) itself is about 'action upon a judgment'. Though the existence or non-existence of a cause of action may or may not be a factor to be considered, if we say that for there to be action there must be a cause of action, then *the existence of a judgment and the failure to satisfy the judgment debt itself is a cause of action. In any event, it is a remedy provided by law, whether it is to be considered as a cause of action or not, is relevant. Furthermore, a bankruptcy proceeding is bv way of petition, just like divorce, winding-up or election, to name a few. Thus a bankruptcy proceeding bears the characteristics of a fresh proceeding unlike an execution proceeding*.

On these grounds, I am inclined to the view that a bankruptcy proceeding, by definition of the word 'action' in s 2 of the Act is an 'action' and it is caught by the provisions of 6(3).

[60] In conclusion His Lordship said:

It is my considered opinion that a bankruptcy proceeding is an 'action upon a judgment' within the meaning of s 6(3). The limitation for bringing the action is twelve years but the arrears of interest may only be claimed for six years.

[61] In this regard s 6(3) of the Limitation Act 1953 provides:

(3) *An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable* and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

[62] It is clear from the aforesaid judgment that a bankruptcy proceeding is not a writ of execution within the meaning of O 46 r 2 of the RHC 1980, and that unlike execution which is the continuation of the existing proceeding to enforce a judgment provided by RHC 1980, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee. Unlike an execution proceeding, a bankruptcy proceeding bears the characteristics of a

fresh proceeding. Thus a bankruptcy proceeding is an action caught by the provision under s 6(3) of the Limitation Act 1953. It is an action upon a judgment, ie, an action to enforce a judgment. Such being the case O 46 r 2 of the RHC does not apply. Since a bankruptcy proceeding is an action upon a judgment within the meaning of s 6(3) of the Limitation Act 1953, and limitation for bringing the action is 12 years, a judgment creditor is entitled to enforce a final judgment by instituting bankruptcy proceeding without the leave of the court within that period of twelve years. In other words, if the judgment creditor institutes a bankruptcy proceeding (to enforce a final judgment) within that 12 year period, he 'shall be deemed to be a creditor who has obtained a final judgment or final order' within the meaning of s 3(1)(i) of the BA 1967. Further, in our view, since O 46 r 2 of the RHC does not apply to bankruptcy proceeding, there is no reason or justification to use it to read into the phrase, 'execution thereon not having been stayed' in s 3(1)(i) of the BA 1967, the implication that in addition to there being no stay of execution by the court, the creditor must be in a position to issue immediate execution. The only bar for the institution of bankruptcy proceeding is the limitation under s 6(3) of the Limitation Act 1953.

[63] For the reasons which we have given, our answer to the first question is as follows. The phrase 'any person who is for the time being entitled to enforce a final judgment' in the proviso to s 3(1)(i) of the Bankruptcy Act 1967 does not require a judgment creditor to obtain leave pursuant to O 46 r 2(1)(a) of the Rules of the High Court 1980 prior to initiating a bankruptcy proceeding based on a final judgment which has been obtained more than six years ago.

[64] Our answer to the first question would be sufficient to dispose of the present appeals. We therefore find no necessity of answering the second and the third questions.

[65] In the result, for reasons which we have given, we allow with costs the appellant's appeals in:

(a) Civil Appeal No 03–1–03 of 2012; and

(b) Civil Appeal No 03–2–03 of 2012.

[66] Consequently:

(a) in Civil Appeal No 03–1–03 of 2012 the decisions of Court of Appeal and the High Court are set aside; and

(b) in Civil Appeal No 03–2–03 of 2012 the decision of the Court of Appeal is set aside. The decision of the High Court is reinstated.

Order accordingly.

Reported by Ashok Kumar